**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 13**

**VW CREDIT, INC.**

**and** **Case 13-CA-158715**

**KELLEY HELLMAN, AN INDIVIDUAL**

**VOLKSWAGEN GROUP OF AMERICA, INC.**

**and** **Case 13-CA-166961**

**KELLEY HELLMAN, AN INDIVIDUAL**

## GENERAL COUNSEL'S BRIEF TO THE BOARD

Respondent VW Credit, Inc., ("Respondent VW Credit") and Respondent Volkswagen Group of America, Inc. ("Respondent VWGoA") (collectively referred to as "Respondents") maintain an Agreement to Arbitrate that discourages employees from engaging in conduct protected by Section 7 of the National Labor Relations Act ("the Act"). Virtually all of Respondents' employees, as a condition of employment, were required to sign the Agreement to Arbitrate. (Jt. Mot. p. 3 ¶14) Because a reasonable employee would conclude the Agreement to Arbitrate prohibits them from filing charges with the Board, Respondents plainly violated Section 8(a)(1) of the Act as alleged in the Consolidated Complaint.[1] In addition, Respondents' belated effort to cure that unlawfulness fails for two reasons. First, the savings clause

[1] Charging Party Kelley Hellman filed charge 13-CA-158715 against Respondent VW Credit on August 25, 2015. Complaint and Notice of Hearing in that case issued October 28, 2015 and Respondent VW Credit's Answer was received on November 9, 2015. Charge 13-CA-166961 was filed by Hellman, against Respondent VWGoA, on January 4, 2016. On March 31, 2016 an Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing issued in cases 13-CA-158715 and 13-CA-166961, which was revised by an April 6, 2016 Corrected Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing. Respondents' Answer to the Amended Consolidated Complaint was received April 20, 2016. The parties filed a Joint Motion to Submit a Stipulated Record to the Board and Joint Stipulation of Facts on September 2, 2016 and on December 2, 2016 the Board approved the stipulated record, granted the motion, and transferred further proceedings to the Board.

Respondents added merely creates more ambiguity and is not sufficient to remedy the violation. Second, even assuming Respondents' revisions cured the unlawfulness, it was insufficient under established Board law to permit them to avoid a traditional Board remedy, including a standard Notice to Employees.

## I. STATEMENT OF ISSUES

There are two issues to be decided in this case. First, whether Respondents' mandatory arbitration agreement interferes with, restrains, or coerces employees in the exercise of the rights guaranteed under Section 7 of the Act in violation of Section 8(a)(1) of the Act, and second, whether Respondents' Notices to Employees met the Act's full remedial purposes.

## II. STATEMENT OF FACTS

Since on or before February 26, 2015, Respondents have maintained, on a corporate nationwide basis, a mandatory "Agreement to Arbitrate" for certain of its employees. (Jt. Mot. p. 3 ¶12). These employees are required to sign, as a condition of their employment an Agreement to Arbitrate which includes the following terms:

> 2) Submission to Arbitration. Any and all disputes which involve or relate in any way to Employee's employment (or termination of employment) with VWGoA, whether initiated by Employee or by the VWGoA, shall be submitted to and resolved by final and binding arbitration. However, nothing in this agreement shall be construed to restrict or prevent either party from pursuing injunctive relief in a court of competent jurisdiction.
>
> 4) Covered Claims. This Agreement is intended to cover all civil claims which relate in any way to my employment (or termination of employment) with VWGoA including, but not limited to, arbitral claims of employment discrimination or harassment on the basis of race, sex, age, religion, color, national origin, sexual orientation, disability and veteran status (Including any local, state or federal law concerning employment or employment discrimination), claims based on violation of public policy or statute, and claims against individuals or entities employed by, acting on behalf of, or affiliated with VWGoA ("Claims"). However, claims for workers' compensation or for unemployment compensation

benefits are not covered by this Agreement. Nor are claims for injunctive or equitable relief to enforce non-competition or non-solicitation covenants, or to prohibit unfair competition or the unauthorized disclosure of trade secrets or other proprietary information covered by this Agreement. Finally, union related matters or disputes governed by a collective-bargaining agreement and ERISA matters which are covered by an ERISA plan with a dispute resolution provision are not covered by this Agreement.

10) Arbitrator's Authority. The arbitrator shall have no authority to hear or decide any matter that was not processed in accordance with this Agreement. The arbitrator shall have exclusive authority to resolve any Claims, including, but not limited to, a disputes relating to the interpretation, applicability, enforceability or formation of this Agreement. The arbitrator shall have the authority to award any form of remedy or damages available in a court.

(Jt. Mot. p. 3-5 ¶15; Jt. Ex. 8 p. 1-2). This Agreement to Arbitrate is applicable to almost all employees employed by Respondents.

On October 30, 2015, well after Charge 13-CA-158715 was filed, and indeed only *after* the Region issued a complaint in that case, Respondent VW Credit belatedly tried to remedy the unlawful language. Specifically, Respondent VW Credit notified employees of the following change to the agreement: "This Agreement does not restrict your rights to file charges with the NLRB". (Jt. Mot. p. 5 ¶16). Similarly, on January 26, 2016, which was *after* charge 13-CA-166961 had been filed and served on it, Respondent VWGoA sent a notice to the impacted employees that included the same savings clause quoted above. (Jt. Mot. Ex. 10).

## III. ARGUMENT

### A. Respondents' mandatory Agreement to Arbitrate interferes with, restrains, or coerces employees in the exercise of the rights guaranteed under Section 7 of the Act

The Board analyzes arbitration agreements under the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *U-Haul Co. of California*, 347 NLRB 375, 378 (2006). Under that test, when a rule does not explicitly restrict activity protected by Section 7, the

finding of a violation is dependent upon a showing of one of the following: (1) reasonable employees would construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

In applying that standard here, the Agreement to Arbitrate is plainly unlawful even though it does not explicitly prohibit access to the NLRB because reasonable employees would construe the language to prohibit Section 7 activity. This case is similar to *U-Haul Co. of California*. There, the Board found a violation of 8(a)(1) where Respondent's arbitration policy broadly mandated arbitration for any claims arising out of any federal law or regulations. *Id*. at 378 (2006). The same is true here. Respondents' Agreement to Arbitrate broadly references claims based on violations of "public policy or statute," which employees would reasonably believe includes the Act. For example, paragraph four of the agreement specifically states that "covered claims" include: "*all civil claims which relate in any way to my employment (or termination of employment) . . .* [and] *claims based on violation of public policy or statute . . .*" (emphasis added). This broad language would certainly lead reasonable employees to believe that their Section 7 activities, and specifically the right to file charges with and access the processes of the Board, are restricted. Similarly, paragraph two of the Agreement to Arbitrate expressly states that "*any and all disputes which involve or relate in any way to Employee's employment (or termination of employment) . . .* be submitted to and resolved by final and binding arbitration[]" (emphasis added). Thus, this paragraph would also lead reasonable employees to believe that accessing the Board's processes for "disputes which involve employee's employment and/or claims based on violation of public policy or statute" is strictly prohibited.

The only claims explicitly excluded in the Agreement to Arbitrate are the following: (1) claims for workers' compensation, (2) claims for unemployment compensation benefits; (3) certain employer claims for injunctive relief; (4) union related matters or disputes governed by a collective-bargaining agreement; and (5) ERISA matters which are covered by an ERISA plan with a dispute resolution provision. While exception four would permit the filing of certain unfair labor practice charges, it does not allow for the filing of many other types of charges, including those involving protected concerted activity in a non-union workplace.

Thus, the language of the Agreement to Arbitrate is reasonably read to require employees to resort to the Respondents' arbitration procedures instead of filing charges with the Board and is therefore unlawful.

### B. Respondents' Notices to Employees did not meet the Act's full remedial purposes

Respondents' attempt to remedy the unlawful Agreement to Arbitrate in the October 2015 and January 2016 notices to employees is woefully insufficient. Respondents revised the Agreement to Arbitrate to include the following: "This Agreement does not restrict your rights to file charges with the NLRB."

However, the Board has rejected these types of savings clauses because they are confusing and ambiguous when combined with other contradictory language in the agreement. *Murphy Oil*, 361 NLRB No. 72, slip. op. at 19 (2014); *D.R. Horton*, 357 NLRB No. 184, slip op. at 7 (2012). As noted above, paragraph four of Respondents' Agreement to Arbitrate states that the Agreement "is intended to cover all civil claims which relate in any way . . . to . . .state or *federal law* concerning employment or employment discrimination . . ." (emphasis added). Thus, this language would directly contradict the savings clause, creating ambiguity which should be

construed against Respondents. See *Neiman Marcus Group, Inc*., 362 NLRB No. 157 (2015). Accordingly, the revised Agreement to Arbitrate still violates the Act.

In addition, even if the revision were sufficient, Respondents attempted cure falls well short of established Board law regarding repudiating violations of the Act. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978). Under *Passavant*, an employer can relieve itself of liability for its unlawful conduct by repudiating its conduct so long as the repudiation is timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed illegal conduct, and accompanied by assurances that the employer will not interfere with employees' Section 7 rights in the future. *Id*.

The Agreement to Arbitrate was maintained and in effect since at least February 26, 2015. Yet it was not until October 20, 2015, over six months later, that Respondent VW Credit sent its first notice to employees explaining that the Agreement to Arbitrate was being revised. With respect to Respondent VWGoA, it was not until nearly a year later, on January 26, 2016, that a similar notice was sent to employees advising them of the revision. Therefore, Respondents' revision fails the *Passavant* requirement that an effective rescission must be timely. Additionally, Respondents' notices do not assure employees that Respondents will not interfere with employees' Section 7 rights in the future. In fact, Respondents fail to admit that the policy violated the Act at all. Instead, Respondents use vague language suggesting that the policy was initially not clear, and that "[t]he Board thought that [Respondent] could be clearer." While Respondents are correct that they were unclear, this lack of clarity amounted to a violation of the Act, which Respondents must now take responsibility for and remedy. Thus, in place of an admission, Respondents instead offered an exculpation.

Because Respondents' notices were not timely, did not specify the nature of the coercive conduct, failed to give assurances that Respondents will not interfere with employees Section 7 rights in the future, and as discussed above, continue to contain ambiguous language, they do not relieve Respondents from liability under *Passavant.*

## IV. CONCLUSION

Counsel for the General Counsel urges the Board to find that Respondents violated the Act as alleged and that Respondents be ordered to cease and desist from engaging in the maintenance of its Agreement to Arbitrate prohibiting employees from being a member or representative of a class. By their maintenance of the Agreement to Arbitrate, Respondents have violated Section 8(a)(1) of the Act because the Agreement to Arbitrate is overly broad and leads employees to reasonably construe it to preclude them from filing unfair labor practice charges or otherwise accessing the Board and its processes and interferes with employees' rights to pursue employment related claims on a class or collective basis.

Counsel for the General Counsel respectfully requests that an order be issued consistent with Board law, and as requested in the Amended Consolidated Complaint and Notice of Hearing that issued on April 6, 2016.

Dated at Chicago, Illinois this 9th day of January 2017.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certified that copies of the **Counsel for the General Counsel's Brief to the National Labor Relations Board** has been electronically filed with the Executive Secretary and served upon the following parties via electronic mail this 9th day of January, 2017.

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